

**RE LAU KAH HING; EX P INSTITUT MEMANDU
MAJU JAYA SDN BHD (IN LIQUIDATION)**

HIGH COURT SABAH & SARAWAK, SIBU
WONG SIONG TUNG J

[BANKRUPTCY PROCEEDINGS NO: SBW-29NCC-90-11-2021 (HC)]
27 MARCH 2024

Abstract – *Solicitors that are appointed by a party to represent him or her in a bankruptcy action through the filing of a notice of appointment as advocates is authorised to accept any cause papers, including a creditor’s petition, on behalf of the said party. The said notice of appointment will act as a written confirmation that the appointed solicitors is authorised to accept on behalf of that party.*

BANKRUPTCY: *Petition – Service – Creditor’s petition (‘CP’) served on solicitors representing judgment debtor (‘JD’) – Solicitors appointed through filing of notice of appointment as advocates and solicitors on record for JD – Whether good service – Whether there was lacuna in Insolvency Act 1967 and Insolvency Rules 2017 regarding acceptance of service of CP by solicitors – Whether relevant rules under Rules of Court 2012 applicable – Whether solicitors authorised to accept service of CP on behalf of JD*

BANKRUPTCY: *Act of bankruptcy – Date of commission – Bankruptcy notice (‘BN’) set aside on 13 June 2022 – BN reinstated or restored on 19 October 2022 – Bankruptcy order issued against judgment debtor (‘JD’) due to non-compliance with reinstated or restored BN – Whether act of bankruptcy committed by JD on 13 June 2022 or 19 October 2022 – Whether creditor’s petition presented to JD within sixth-month period as prescribed under insolvency law*

In 2021, the judgment creditor (‘JC’) successfully procured the issuance of a bankruptcy notice (‘BN’) against the judgment debtor (‘JD’) for a judgment debt. The BN was thereafter issued on the JD by way of substituted service, through a publication in a newspaper. This prompted the JD, through its firm of solicitors which were appointed by the filing of a notice of appointment as advocates (‘appointed solicitors’), to take out a summons in chambers to apply for the setting aside of the BN on the ground that the sum as claimed by the JC was not supported by evidence and it was disputed. The application was then heard by the Senior Assistant Registrar (‘SAR’), who on 13 June 2022, decided to allow the said application and set aside the BN. Dissatisfied, the JC subsequently lodged an appeal against the said SAR’s decision. After the appeal was heard by the previous presiding judge in chambers on 19 October 2022, the appeal was allowed, and the BN was reinstated or restored. On 25 November 2022, the JC also presented a creditor’s petition (‘CP’) against the JD based on the ground that there was a non-compliance by the JD with the reinstated or restored BN. A

- A bankruptcy order ('BO') was hence made by the SAR against the JD. As a response, the JD, during the preceding months, filed two notice of applications to set aside the BO, respectively, on the grounds that: (i) the JD was never served with the CP ('encl. 85'); and (ii) the service of the CP was irregular considering that it was presented on the JD more than six months after the act of bankruptcy by the JD occurred ('encl. 102'). After the said applications were heard by the SAR, encl. 85 was allowed, while encl. 102 was dismissed. Aggrieved, the parties then filed the present appeals against the SAR's decisions, *via* encls. 117 and 126. The appeal under encl. 117 was an appeal by the JC against the SAR's decision to allow encl. 85 on the ground that the JD was never served with the CP. Whereas encl. 126 was an appeal by the JD against the SAR's decision to dismiss encl. 102 on the ground that the service of the CP on the JD was not irregular. The issues that arose under encl. 117 were: (i) whether the service of the CP on the JD's appointed solicitors, who were the JD's advocates on record in the bankruptcy action, was permissible in law; and (ii) whether the JD was precluded from contending that its appointed solicitors were not appointed or authorised to accept the service of the CP on its behalf. Meanwhile, the issue that arose under encl. 126 was whether the CP was presented on the JD beyond the prescribed period as mentioned under the insolvency law.
- Held (allowing encl. 117; dismissing encl. 126):**
- (1) The Insolvency Act 1967 ('IA 1967') and the Insolvency Rules 2017 ('IR 2017') do not contain provisions regulating the appointment of advocates by debtors to represent them in bankruptcy matters or action. There were no provisions outlining the process for filing a notice of appointment as advocates on behalf of a debtor in a bankruptcy action. These laws do not address the procedure for debtor-appointed advocates to accept service of the cause papers in bankruptcy proceedings, including the CPs. Considering this *lacuna*, the relevant rules under the Rules of Court 2012 ('ROC') relating to the appointment of advocates or solicitors to act for the parties in ordinary actions, with necessary changes or modifications, shall apply to the proceedings in bankruptcy action by virtue of r. 284 of the IR 2017. Other than that, O. 62 r. 13 of the ROC which relates to the service of documents on parties' appointed advocates or solicitors on record in an action, would also apply. (paras 33-36)
- (2) As the appointed solicitors had been appointed by the JD and they had filed the notice of appointment as advocates, it must be taken that the JD had authorised the appointed solicitors to act for it in all matters in the bankruptcy action, including accepting the service of the CP. The notice of appointment as advocates was a written indication that confirmed the appointed solicitors was authorised by the JD to accept the service of the CP on its behalf. It would be intolerable and lead to the gravest of injustice, if the JD having appointed the appointed

solicitors to represent and act for it in the proceedings in this bankruptcy action and accepting service of documents – particularly when the appointed solicitors had indeed accepted the service of the CP – could selectively claim that the appointed solicitors were not authorised to accept on his behalf, the CP or any documents in the proceedings in this bankruptcy action, all to suit his case. The SAR erred in law by holding that the service of the CP on the JD’s appointed solicitors was not a valid service. Enclosure 117 was therefore allowed, and the BO made against the JD was reinstated or restored. (paras 42-44 & 46-48)

- (3) On 19 October 2022, the previous presiding judge-in-chambers had allowed the JC’s appeal and overturned the SAR’s decision made on 13 June 2022. This had resulted in the restoration of the BN and its effectiveness from 19 October 2022. The act of bankruptcy stemming from the non-compliance with the BN by the JD was deemed effective and completed only on 19 October 2022 and not on 13 January 2022 because the BN was set aside by the SAR and no act of bankruptcy could have taken effect on that date. On 25 November 2022, the JC presented the CP against the JD, which was within the six-month period prescribed under s. 5(1)(c) of the IA 1967 construed with r. 93(2) of the IR 2017 counting from the date of the decision of the previous presiding judge-in-chambers in restoring the BN (19 October 2022). The SAR was correct in law to hold that the act of bankruptcy committed by the JD was completed or deferred to 19 October 2022. Even when calculating from 13 June 2022, the CP presented by the JC on 25 November 2022 still fell within the prescribed six-month period. As such, encl. 126 was dismissed. (paras 77-83)

Case(s) referred to:

- Callow v. Young* (1886) 55 LT 543 (*refd*)
Court v. Berlin [1897] 2 QB 396 (*refd*)
Evans v. Bartlam [1937] AC 473 (*refd*)
Ex parte The Debtor v. Chantry Mount And Hawthorns Ltd [1980] 1 WLR 665 (*refd*)
Getz Brothers & Co GmbH v Pan-Malaysian Wood Products Sdn Bhd [1980] CLJU 21; [1980] 1 LNS 21 FC (*refd*)
In Re A Debtor (No. 44 Of 1978) (*refd*)
Kerajaan Malaysia v. Beyond Gateway Sdn Bhd [2003] 2 CLJ 527 HC (*refd*)
Lady De La Pole v. Dick (1885) 29 CH D 301 (*refd*)
Lim Boon Kiat v. Affin Bank Bhd [2013] 6 CLJ 579 CA (*dist*)
Ng Yen Kok v. AmFinance Bhd [2013] CLJU 366; [2013] 1 LNS 366 CA (*refd*)
Public Bank Bhd v. Kemajuan Flora Sdn Bhd & Intervener [2001] 8 CLJ 626 HC
Re A Debtor (No. 10 of 1953) *Ex parte The Debtor v. Ampthill Rural District Council* [1953] 1 WLR 1050 (*dist*)
Re Natarajan Kuppusamy, Ex P Co-Operative Central Bank Ltd (In Receivership) [1992] 2 MLJ 468 (*refd*)
Re Wingfield & Blew [1904] 2 Ch 655 (*refd*)
RHB Bank Bhd v. Welinko Sdn Bhd & Ors & Another Suit [2002] 2 CLJ 321 HC (*refd*)
Sarjudin Bahri v. Punca Klasik Sdn Bhd & Anor [1997] 2 CLJ Supp 481 HC (*refd*)

- A *Soh Bok Yew v. Cindee Developments Sdn Bhd* [1977] CLJU 124; [1977] 1 LNS 124 FC (*refd*)
Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd [1996] 1 CLJ 241 FC (*refd*)
Underwood, Son & Piper v. Lewis [1894] 2 QB 306 (*refd*)
Venkatlal Govindlal v. Juggilal Kamalapat Hosier [1955] ILR Bom 1059 (*refd*)
- B *Westech Sdn Bhd v. Thong Weng Lock* [2017] 8 CLJ 257 FC (*refd*)
Yukilon Manufacturing Sdn Bhd & Anor v. Dato' Wong Gek Meng & Ors (No 2) [1997] 4 CLJ 209 HC (*refd*)

Legislation referred to:

- Bankruptcy Rules 1969, r. 95
- C Insolvency Act 1967, ss. 3(1)(i), 5(1)(c), 6(1)
 Insolvency Rules 2017, rr. 93(1), (2), 108, 136, 284
 Rules of Court 2012, O. 38 r. 10, O. 56 r. 1, O. 62 rr. 1(3), 2, 13, O. 64 r. 2
 Bankruptcy Act 1914 [UK], s. 4(1)(c)
- For the judgment creditor - Robert Tang; M/s Ariffin, Lai And Kan Advocates*
- D *For the judgment debtor - Lee Yi Eng; M/s Arthur Lee, Lin & Co Advocates*
- Reported by Syamim Ariffin*

JUDGMENT

- E **Wong Siong Tung J:**

The Matters

- [1] Before this court, there are two appeals under O. 56 r. 1 of the Rules of Court 2012, against the decisions of the learned Senior Assistant Registrar made on 4 January 2024.
- F [2] The first appeal is filed by the judgment creditor (encl. 117), contesting the learned Senior Assistant Registrar's decision on 4 January 2024 to grant the judgment debtor's notice of application dated 19 September 2023 (encl. 85), which sought to set aside the bankruptcy order issued against
- G the judgment debtor on 3 January 2023 on the ground that the judgment debtor was never served with the creditor's petition.
- [3] The second appeal is filed by the judgment debtor (encl. 126) against the decision of the learned Senior Assistant Registrar made on the same day in dismissing the judgment debtor's notice of application (encl. 102) also in
- H seeking to set aside the same bankruptcy order made against the judgment debtor, this time alleging irregularity in the creditor's petition.

Appeal Under Order 56 Rule 1 Of The Rules Of Court 2012

- [4] In *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 CLJ 241; [1996] 1 MLJ 30, the Federal Court held that appeals from decisions of the Registrar to a Judge in Chambers are by way of an actual rehearing. The judge treats the matter as though it comes before him or her for the first time.
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See also: *Evans v. Bartlam* [1937] AC 473 (HL); and *Kerajaan Malaysia v. Beyond Gateway Sdn Bhd* [2003] 2 CLJ 527. A

Brief Background

[5] On 8 November 2021, the judgment creditor procured the issuance of a bankruptcy notice by the court against the judgment debtor for a judgment debt for a sum of RM1,080,000 due under a judgment obtained by the judgment creditor against the judgment debtor in Originating Summons No. SBW-24NCvC-10/4-2018. B

[6] The bankruptcy notice was served on the judgment debtor by way of substituted service pursuant to a court order made on 28 December 2021 by publication of the prescribed advertisement in the New Sarawak Tribune newspaper on 5 January 2022. C

See: affidavit of service filed as encl. 11.

[7] On 21 January 2022, the judgment debtor instructed his present firm of advocates to act by filing a notice of appointment as advocates to act for the judgment debtor in the matter. D

See: notice of appointment as advocates dated 21 January 2022 (encl. 13).

[8] At the same time, on behalf of the judgment debtor, the judgment debtor's advocates took out a summons in chambers (encl. 14) applying to set aside the bankruptcy notice on the grounds that the sum as claimed by the judgment creditor is not supported by evidence and that the sum claimed by the judgment creditor is disputed. E

[9] The judgment debtor's application to set aside the bankruptcy notice was heard by the learned Senior Assistant Registrar then, who on 13 June 2022, allowed the judgment debtor's application and set aside the bankruptcy notice. F

See: encl. 37.

[10] Not satisfied with the learned Senior Assistant Registrar's decision then, the judgment creditor lodged an appeal by a notice of appeal dated 20 June 2022 against the decision under O. 56 r. 1 of the Rules of Court 2012 to the judge in chambers. G

See: encl. 38.

[11] On the 19 October 2022, the learned judge previously presiding, allowed the judgment creditor's appeal and the order of the Senior Assistant Registrar made on 13 June 2022 was set aside. The bankruptcy notice was thus restored or reinstated. H

See: encl. 61. I

- A [12] On 7 November 2022, the judgment debtor then lodged a notice of appeal to the Court of Appeal against the decision of the learned previous presiding judge which appeal was registered as Court of Appeal Civil Case No: Q-03(IM)(NCvC)-107-11/2022.
- B [13] In the meanwhile, on 25 November 2022, the judgment creditor presented a creditor's petition against judgment debtor based on the non-compliance by the judgment debtor of the restored or reinstated bankruptcy notice.
See: encl. 70
- C [14] On 3 January 2023, the learned Senior Assistant Registrar then made a bankruptcy order against the judgment debtor.
See: encl. 79
- D [15] More than nine months later, that is on 19 September 2023, the judgment debtor by his current appointed firm of advocates, filed the said notice of application dated 19 September 2023 (encl. 85) to set aside the bankruptcy order on the grounds that he was never served with the creditor's petition.
- E [16] Then, over two months later, on 4 December 2023, the judgment debtor by his appointed advocates, filed the said notice of application (encl. 102) also applied to set aside the bankruptcy order on the ground that the creditor's petition was irregular, that is the creditor's petition was presented more than six months after the act of bankruptcy allegedly occurred on 17 January 2022.
- F [17] The learned Senior Assistant Registrar heard both the judgment debtor's applications together. On 4 January 2024, the learned Senior Assistant Registrar granted judgment debtor's application (encl. 85) and set aside the bankruptcy order due to irregular service of the creditor's petition. The learned SAR ordered the creditor's petition to be served on judgment debtor within seven days and scheduled a hearing of the creditor's petition for 21 February 2022.
- G [18] Simultaneously, the learned Senior Assistant Registrar dismissed judgment debtor's second application (encl. 102), rejecting the ground that the creditor's petition was presented beyond the prescribed time under insolvency law.
- H [19] Hence, these two appeals of the judgment creditor under encl. 117 and of the judgment debtor under encl. 126 before this court.

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[20] Both appeals were heard together by this court.

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Judgment Creditor's Appeal (Enclosure 117) In Respect Of The SAR's Decision Which Granted The Judgment Debtor's Notice Of Application (Enclosure 85)

[21] It is indisputable that the creditor's petition was served on 12 December 2022 on the judgment debtor's current firm of advocates appointed to act in the bankruptcy action which firm of advocates has also acknowledged receipt of it.

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[22] However, the judgment debtor alleged that he did not appoint his current firm of advocates whom he appointed to act in the bankruptcy action, to accept service of creditor's petition on his behalf.

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See: para. 5 of encl. 91 read with para. 4 of encl. 92.

[23] In allowing the judgment debtor's application (encl. 85) to set aside the bankruptcy order, the learned Senior Assistant Registrar held that the service of the creditor's petition in this case on the judgment debtor's current firm of advocates appointed to act in the action is defective and contrary to r. 108 of the Insolvency Rules 2017 read with s. 6(1) of the Insolvency Act 1967.

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[24] The learned Senior Assistant Registrar held that by the said provisions, it is mandatory that the creditor's petition be served on the judgment debtor personally.

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[25] The issues for determination in this judgment creditor's appeal are twofold: firstly, whether serving the creditor's petition on judgment debtor's currently firm of advocates, who have filed the notice of appointment as judgment debtor's advocates on record in the bankruptcy action, is permissible in law; and secondly, whether the judgment debtor is precluded from claiming that he did not appoint or authorise his current firm of advocates to accept service of the creditor's petition on his behalf.

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[26] On the first issue, s. 6 of the Insolvency Act 1967 so far as relevant provides that:

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6 Proceedings and order on creditor's petition (1) ...

(IA) Notwithstanding subsection (2), the court may make an order for substituted service of a creditor's petition as prescribed if the creditor can prove to the satisfaction of the court that the debtor, with intent to defeat, delay or evade personal service:

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(a) departs out of Malaysia or being out of Malaysia remains out of Malaysia; or

(b) departs from his dwelling house or otherwise absents himself, or secludes himself in his house or closes his place of business.

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A (IB) An application for an order for substituted service shall state the facts on which the application is founded.

(IC) A substituted service of a creditor's petition, in relation to which an order is made under this section, is effected by taking such steps as the court may direct to bring the creditor's petition to the person to be served.

B (2) ... (7)

[27] Rule 108 of the Insolvency Rules 2017 provides that:

108 Personal service

C A creditor's petition **shall be personally served** and the service shall be effected by an officer of the court or by the creditor or his solicitor or a person in their employment by delivering a sealed copy of the petition to the debtor.

(emphasis added)

D [28] However, in *Lim Boon Kiak v. Affin Bank Bhd* [2013] 6 CLJ 579; [2014] 1 MLJ 439, the Court of Appeal held at para. 12 that:

E [12] *Rule 109 makes it mandatory for the creditor's petition to be served personally (kediri) on the judgment debtor. The sealed copy of the petition must be delivered personally to the debtor. In the event that prompt personal service cannot be effected, after attempts have been made, the only avenue left is to apply for substituted service as provided for under r 110. Substituted service can only be effected with leave of the court. With the clear provisions of the above rules, it is our view that the creditor's petition against a judgment debtor cannot be served by any other means. It cannot be served on a firm of solicitors, unless there is a clear indication (in writing) that the said firm of solicitors has the authority to accept service of the documents on behalf of the judgment debtor.*

(emphasis added)

G [29] That being the case, though it is mandatory for the creditor's petition to be served personally on the judgment debtor, when there is clear indication in writing that a firm of solicitors have been authorised to accept service on behalf of the judgment debtor, the creditor's petition may be served on that firm of solicitors.

H [30] In *Lim Boon Kiak v. Affin Bank Bhd (supra)*, the creditor's petition was served by post to a firm of solicitors alleged to be the solicitors of the judgment debtor. In that case, there was no indication in writing that the firm of solicitors concerned was authorised to accept service of the creditor's petition on behalf of the judgment debtor and the judgment creditor was unable to produce any form of authority to show that the firm of solicitors concerned have the authority to accept service of the creditor's petition on behalf of the judgment debtor. Thus, the Court of Appeal held that the service of the creditor's petition was bad and consequently, the Court of Appeal allowed the judgment debtor's appeal in that case, and set aside the creditor's petition as well as the adjudication order and receiving order made against the judgment debtor.

[31] Unlike the facts in *Lim Boon Kiak v. Affin Bank Bhd (supra)*, in the present case, the firm of advocates currently representing the judgment debtor have filed and served a notice of appointment as advocates dated 21 January 2022 (encl. 13) in this bankruptcy action. Judicial notice should be taken of this document filed in the action.

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See: Order 38 r. 10 of the Rules of Court 2012.

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See also: *RHB Bank Bhd v. Welinko Sdn Bhd & Ors & Another Suit* [2002] 2 CLJ 321.

[32] The notice of appointment as advocates dated 21 January 2022 (encl. 13), addressed to the Registrar and the judgment creditor's advocates, and filed in the action, explicitly states that the current firm of advocates has been appointed to act as advocates for the judgment debtor in the matter. It also provides their address for the service of documents in this bankruptcy action.

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[33] The Insolvency Act 1967 and the Insolvency Rules 2017 do not contain specific provisions regulating the appointment of advocates by debtors to represent them in bankruptcy matters or action. Additionally, there are no provisions outlining the process for filing a notice of appointment of advocates on behalf of a debtor in bankruptcy action. Furthermore, these laws do not address the procedure for debtor-appointed advocates to accept service of the cause papers in bankruptcy proceedings, including creditor's petitions.

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[34] However, r. 284 of the Insolvency Rules 2017 provides that:

284 Rules of Court 2012 applicable in event of lacunae

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In the absence of any rule regulating any proceeding under the Act or these Rules, *the Rules of the Court 2012 shall apply, mutatis mutandis.*
(emphasis added)

[35] Since there is no express provisions, thus a *lacunae* in the Insolvency Rules 2017 providing for appointment by the parties in proceedings in bankruptcy action of advocates or solicitors to act and represent them, the relevant rules in the Rules of Court 2012 relating to the appointment of advocates or solicitors to act for the parties in the ordinary actions with necessary changes or modifications, shall apply by virtue of r. 284 of the Insolvency Rules 2017 for proceedings in bankruptcy action.

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[36] Order 62 r. 13 of the Rules of the High Court 2012 applicable for service of documents on parties' appointed advocates or solicitors on record in an action, is reproduced as follows:

Service upon solicitor or party formerly appearing in person (O. 62 r. 13)

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13. Where a party after having sued or appeared in person *has given notice in writing* to the opposite party or his solicitor, *through a solicitor, that such solicitor is authorised to act in the cause or matter on his behalf*, all writs, notices,

- A pleadings, summonses, orders, warrants and other documents, proceedings, and written communications which *ought to be delivered to or upon the party on whose behalf the notice is given shall thereafter be delivered to or upon such solicitor.*
(emphasis added)
- B See also: O. 62 r. 1(3) and O. 64 r. 2 of the Rules of Court 2012.
- C [37] The ruling of the Court of Appeal in *Lim Boon Kiat v. Affin Bank Bhd* (*supra*) to the effect that a creditor's petition can be considered validly served on a firm of solicitors if there is clear indication (in writing) that the firm has the authority to accept service of the creditor's petition on behalf of the judgment debtor, aligns with the pertinent provisions of the Rules of Court 2012 on the appointment of solicitors by the parties in the action.
- D [38] Thus, it is permissible to serve the creditor's petition on a firm of advocates or solicitors when there is clear indication in writing that the firm of advocates or solicitors have the authority to accept service of the same on behalf of a judgment debtor.
- E [39] The rule has been that service on the advocates or solicitors who filed and served the notice of appointment as advocates or solicitors for a party in an action and thus, placed themselves on record is good service on the party that the advocates or solicitors are so representing.
- F See: *Public Bank Bhd v. Kemajuan Flora Sdn Bhd & Intervener* [2001] 8 CLJ 626; [2001] AMEJ 0273; [2001] MLJU 467; *Getz Brothers & Co GmbH v. Pan-Malaysian Wood Products Sdn Bhd* [1980] CLJU 21; [1980] 1 LNS 21; [1980] 2 MLJ 79; and *Yukilon Manufacturing Sdn Bhd & Anor v. Dato' Wong Gek Meng & Ors (No 2)* [1997] 4 CLJ 209; [1998] 5 MLJ 1.
- G [40] Thus, as long as the current firm of advocates retained by the judgment debtor remains on record or officially designated in this bankruptcy action as the firm of advocates acting for the judgment debtor, service of any documents, including the creditor's petition, upon the current firm of advocates constitutes valid service on the judgment debtor.
- H See also: *Lady De La Pole v. Dick* (1885) 29 CH D 301 and *Callow v. Young* (1886) 55 LT 543.
- I [41] The retainer of advocates or solicitors to conduct or defend an action for their clients would generally continue until the final conclusion of the cause or matters in the action.
- [42] Given that the judgment debtor has appointed his current firm of advocates to act on his behalf in this bankruptcy action and the said firm of advocates has filed the notice of appointment as advocates (encl. 13)

accordingly, it must be taken that the judgment debtor has authorised his current firm of advocates to act for him in all matters in the bankruptcy action, including accepting service of the creditor's petition on their behalf in the proceeding in this bankruptcy action.

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[43] This notice of appointment as advocates (encl. 13) is written indication that confirms that the judgment debtor's current firm of advocates on record in this bankruptcy action is authorised to accept service of the creditor's petition on behalf of the judgment debtor in the proceedings in this bankruptcy action.

B

[44] It would be intolerable, and lead to the gravest injustice, if the judgment debtor having appointed his current firm of advocates to represent and act for him in the proceedings in this bankruptcy action and accepting service of documents – particularly when the firm of advocates have indeed accepted service of the creditor's petition – could selectively claim that his chosen and appointed firm of advocates was not authorised to accept on his behalf, the creditor's petition or any documents in the proceedings in this bankruptcy action, all to suit his case.

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[45] Therefore, on the second issue, and for the reasons as given, the judgment debtor is precluded from claiming and cannot be heard to say that he did not appoint or authorise his current firm of advocates to accept service of the creditor's petition on his behalf.

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[46] That being the case, the learned Senior Assistant Registrar has erred in law in holding that the service of the creditor's petition on the judgment debtor's current firm of advocates appointed on record to act for the judgment debtor in the bankruptcy action which firm of advocates have in fact accepted service of the bankruptcy notice on behalf of the judgment debtor, is not valid service of the creditor's petition.

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[47] Consequently, for the reasons given, this court allows the judgment creditor's appeal under encl. 117 with costs in the sum of RM3,000.

[48] The decision and order of the learned Senior Assistant Registrar made on 4 January 2024 is therefore set aside and the bankruptcy order made against the judgment debtor on 3 January 2023 is hereby reinstated or restored.

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Judgment Creditor's Appeal (Enclosure 126) In Respect Of The SAR's Decision Which Dismissed The Judgment Debtor's Notice Of Application (Enclosure 102)

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[49] The central question to be resolved in the judgment debtor's appeal is whether the creditor's petition, presented by the judgment creditor, and grounded on the act of bankruptcy stemming from the judgment debtor's non-compliance with the bankruptcy notice issued by the judgment creditor on 8 November 2021 served on the judgment debtor on 5 January 2022 is out of the prescribed time period under the insolvency law.

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A [50] Section 5(1)(c) of the Insolvency Act 1967 provides as follows:

5 Conditions on which creditor may petition

(1) A creditor shall not be entitled to present a bankruptcy petition against a debtor unless:

B (a) ...

(b) ...

(c) the act of bankruptcy on which the petition is grounded **has occurred within six months before the presentation of the petition;**

(c) (d) ...

...

(7) If the petitioning creditor fails to comply with the requirements of this section, the court shall dismiss the petition.

(emphasis added)

D [51] Under s. 3(1)(i) of the Insolvency Act 1967, a judgment debtor commits an act of bankruptcy if he/she fails to comply with a bankruptcy notice within seven days after it has been served on him/her.

[52] In the instant case, since the bankruptcy notice was served on the judgment debtor on 5 January 2022 by substituted service pursuant to court order, the judgment debtor would have committed the act of bankruptcy on 13 January 2022 upon the judgment non-compliance with the bankruptcy notice.

[53] However, the judgment debtor has filed application to set aside the
F bankruptcy notice.

[54] Rule 93 of the Insolvency Rules 2017 provides that:

93 Application to set aside

G (1) *The filing of an affidavit shall operate as an application to set aside the bankruptcy notice, and the Registrar shall fix a day for the hearing of the application, and shall give not less than three clear days notice to the debtor, the creditor and their respective solicitors, if known.*

(2) If the application cannot be heard before the time specified in the notice for compliance with its requirements, *the Registrar shall extend the time, and no act of bankruptcy shall be deemed to have been committed under the notice until the application has been heard and determined.*

(emphasis added)

[55] Section 136 of the Insolvency Rules 2017 further provides that:

136 Bankruptcy order on bankruptcy notice

I *A bankruptcy order shall not be made against a debtor:*

(a) *on a petition in which the act of bankruptcy alleged is non-compliance with a bankruptcy notice within the appointed time where such debtor has applied to set aside such notice until after the hearing of the application;*

(b) where the notice has been set aside; or

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(c) during a stay of the proceedings thereon but in such case the petition shall be adjourned or dismissed as the court thinks fit.

(emphasis added)

[56] The issue revolves around the interpretation of the relevant insolvency rules and the effects on the determination of when the act of bankruptcy occurred, for the purpose of computing the time period for presenting a creditor's petition.

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[57] In the case of *Re A Debtor (No. 10 of 1953); Ex parte The Debtor v. Ampthill Rural District Council* [1953] 1 WLR 1050; [1953] 2 All ER 561, a bankruptcy notice was issued against the judgment debtor, who then sought to set it aside in that case. The Registrar in that case, dismissed the application on 10 September 1952. Subsequently, the divisional court discharged the Registrar's order and set aside the bankruptcy notice, but the Court of Appeal, on 10 February 1953, reversed the divisional court's decision, restoring the Registrar's order made on 10 September 1952.

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[58] The judgment creditor presented the creditor's petition on 10 March 1953, and upon which the Registrar made a receiving order.

[59] In that case, the applicable provision of s. 4(1)(c) of the English Bankruptcy Act 1914 is similar to s. 5(1)(c) of our Insolvency Act 1967 with a difference only in the prescribed period for presenting the creditor petition.

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[60] Under the English Bankruptcy Act 1914, the period is within three months from the act of bankruptcy committed by the judgment debtor, whereas under our Insolvency Act 1967, it is six months.

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[61] The key issue before the divisional court in that case was whether the prescribed three months for presenting the creditor's petition should be calculated from the Registrar's initial decision (*ie*, on 10 September 1952) or the Court of Appeal's decision overturning the divisional court's ruling (*ie*, on 10 February 1953).

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[62] Referring to r. 141 of the English Bankruptcy Rules 1915 (SR & O. 1914, No. 1824/L.47), which is similar to r. 93 of our Insolvency Rules 2017, Harman J held that the rule is directory. When the application cannot be heard in time as notified, it mandates the Registrar to extend the time to comply with the bankruptcy notice "until the application has been heard and determined."

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[63] Importantly, Harman J held that this directive solely applies to the Registrar's determination and not to decisions made by the divisional court or the Court of Appeal regarding the validity of the bankruptcy notice.

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A [64] Therefore, it was determined that the prescribed three-month period for presenting the creditor's petition by the judgment creditor in that case commenced on 10 September 1952 when the Registrar dismissed the judgment debtor's application to set aside the bankruptcy notice. This date was the starting point over the date of the Court of Appeal's decision on
B 10 February 1953.

[65] Consequently, the creditor's petition, presented on 10 March 1953 by the judgment creditor in that case was held out of time and as a result, the judgment debtor's appeal was upheld, and the petition was dismissed.

C [66] In the current case, a notable distinction exists as the then learned Senior Assistant Registrar initially, which is on 13 June 2022, allowed and granted the judgment debtor's application to set aside the bankruptcy notice in this bankruptcy action and thus, the bankruptcy notice was set aside. Any act of bankruptcy cannot take effect for non-compliance with it.

D [67] However, this decision of the then learned Senior Assistant Registrar on 13 June 2022 in this case was subsequently overturned by the previous presiding judge on a later date that on 19 October 2022 upon the appeal by the judgment creditor to the judge in chambers under O. 56 r. 1 of the Rules of Court 2012.

E [68] This differs from *Re a Debtor (No. 10 of 1953); Ex Parte The Debtor v. Ampthill Rural District Council (supra)*, where the Registrar initially dismissed the judgment debtor's application to set aside the bankruptcy notice and thus affirmed the validity of the bankruptcy notice. The divisional court, on appeal, then reversed the Registrar's decision, and subsequently,
F the Court of Appeal overturned the divisional court's ruling, ultimately reinstating the Registrar's original decision, upholding the validity of the bankruptcy notice.

[69] Regarding the judgment creditor's contention in *Re A Debtor (No. 10 of 1953); Ex Parte The Debtor v. Ampthill Rural District Council (supra)*, that the
G time for presenting the creditor's petition should start from the date (*ie*, on 10 February 1953) the Court of Appeal reversed the Divisional Court's decision and reinstated the Registrar's ruling, Harman J stated at p. 1055 that:

H It was pointed out to us on behalf of the appellant that under RSC, Ord 58, r. 16, which applies to a Divisional Court in Bankruptcy under r. 134 of the rules of 1915 (to which r. 132 of the rules of 1952 corresponds), an appeal does not operate as a stay of execution or of proceedings under the decision appealed from unless the court so orders. The only case touching on this matter to which we were referred was *Nitrate Producers SS Co Ltd v. Short Bros Ltd*. The immediate point is not
I relevant, but Lord Buckmaster in the course of his speech, in which the other Lords concurred, said (127 LT 727):

It is, of course, a totally different proposition where the effect of an order in this House is to restore a judgment of the court of first instance which has been reversed by an order of the Court of Appeal. In that case the judgment of the court of first instance is expressly restored and remains standing as from the date when it was given.

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So here the Court of Appeal reversed the Divisional Court and **restored the registrar's judgment, which, accordingly, remains standing as from the date when it was given**, viz, 10 September 1952. In our judgment, therefore, the appeal succeeds on this ground.

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(emphasis added)

[70] Harman J seems to hold that when the registrar initially sets aside the bankruptcy notice (as opposed to affirming it) and this decision is later overturned by the appellate court, the crucial date for calculating the commencement of the time period to present the creditor's petition is the date of the appellate court's decision. This is the moment when the appellate court reverses the registrar's decision and replaces it, thereby established the effectiveness of the bankruptcy notice and completed the act of bankruptcy.

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[71] The decision in *Re A Debtor (No. 10 of 1953); Ex Parte The Debtor v. Amptill Rural District Council (supra)* has been adopted and followed by the Federal Court in *Westech Sdn Bhd v. Thong Weng Lock* [2017] 8 CLJ 257; [2017] 5 MLJ 368 and *Soh Bok Yew v. Cindee Developments Sdn Bhd* [1977] CLJU 124; [1977] 1 LNS 124; [1977] 1 MLJ 242.

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[72] In *Westech Sdn Bhd v. Thong Weng Lock (supra)*, the Registrar dismissed the application of a judgment debtor to set aside the bankruptcy notice issued against him. The Federal Court held at para. 39 that:

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[39] Rule 95 of the BR is the *statutory exception which defers an act of bankruptcy committed as envisaged by s. 3(1)(i) of the BA*. It is couched with stringent requirements and legal effects, in particular the portion of r. 95(2) of the BR which reads, *no act of bankruptcy shall be deemed to have been committed under the notice until the application has been heard and determined*.

(emphasis added)

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Rule 95 of the Bankruptcy Rules 1969 is *in pari materia* with r. 93 of the Insolvency Rules 2017.

See also: *Ng Yen Kok v. AmFinance Bhd* [2013] CLJU 366; [2013] 1 LNS 366; [2013] 4 MLJ 225; *Re Natarajan Kuppusamy, Ex P Co-Operative Central Bank Ltd (In Receivership)* [1992] 2 MLJ 468; *In Re A Debtor (No. 44 Of 1978), Ex Parte The Debtor v. Chantry Mount And Hawthorns Ltd* [1980] 1 WLR 665; and *Venkatal Govindlal v. Juggilal Kamalapat Hosier* [1955] ILR Bom 1059.

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[73] To recap the indisputable facts in this case, the judgment debtor took out his application to set aside the bankruptcy notice in the bankruptcy action supported by his affidavit on 21 January 2022.

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- A [74] Although the application was in the form of a “summons in chambers”, not strictly following r. 93(1) of the Insolvency Rules 2017 which requires only an affidavit to be filed, it is to be taken as an application under r. 93(1) of the Insolvency Rules 2017.
- B See: *Westech Sdn Bhd v. Thong Weng Lock (supra)* and *Re Natarajan a/L Kuppusamy, Ex P Co-Operative Central Bank Ltd (In Receivership) (supra)*.
- C [75] The application by the judgment debtor in this case to set aside the bankruptcy notice deferred the act of bankruptcy consequential upon non-compliance thereto until the application has been heard and determined by the learned Senior Assistant Registrar.
- [76] Since the learned Senior Assistant Registrar then allowed the judgment debtor’s application and set aside the bankruptcy notice on 13 June 2022, there was no act of bankruptcy committed by the judgment debtor then by the operation of r. 93(2) of the Insolvency Rules 2017.
- D [77] However, on 19 October 2022, the previous presiding judge in chambers allowed the judgment creditor’s appeal, overturning the then learned Senior Assistant Registrar’s order made on 13 June 2022. This resulted in the restoration of the bankruptcy notice and its effectiveness from 19 October 2022, as per the legal principle in *Re A Debtor (No. 10 of 1953); Ex Parte The Debtor v. Ampthill Rural District Council (supra)*.
- E [78] Thus, the act of bankruptcy stemming from non-compliance with the bankruptcy notice by the judgment debtor in this case is deemed effective and completed only on 19 October 2022 and not on 13 January 2022 (*eg*, seven days after service of the bankruptcy notice) because the bankruptcy notice was set aside by the then learned Senior Assistant Registrar and thus, no act of bankruptcy can take effect on that date.
- F [79] On 25 November 2022, the judgment creditor presented the creditor’s petition against judgment debtor, that was within the six month period prescribed by s. 5(1)(c) of the Insolvency Act 1967 construed with r. 93(2)
- G of the Insolvency Rules 2017 counting from the date of the decision of the previous presiding judge in chambers in restoring the bankruptcy notice in this case (*ie*, on 19 October 2022).
- H [80] That being the case, the learned Senior Assistant Registrar is correct in law in holding to the effect that the act of bankruptcy committed by the judgment debtor was completed or deferred to 19 October 2022, the date when the previous presiding judge in chambers overturned the then learned Senior Assistant Registrar’s order, restoring the bankruptcy notice.
- I [81] Consequently, the learned Senior Assistant Registrar has not erred in law and in facts in deciding to dismiss the judgment debtor’s application to set aside the bankruptcy order based on the judgment debtor’s contention that the creditor’s petition was presented beyond the stipulated time period.

[82] Even when calculating from 13 June 2022, the date of the then Senior Assistant Registrar's decision to set aside the bankruptcy notice (which was later reinstated by the previous presiding judge upon judgment creditor's appeal to the judge in chambers), the creditor's petition presented by the judgment creditor on 25 November 2022 still falls within the prescribed six-months period.

[83] In the premises, this court dismisses the judgment debtor's appeal under encl. 126 with costs in the sum of RM3,000 as well.

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